# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 271.

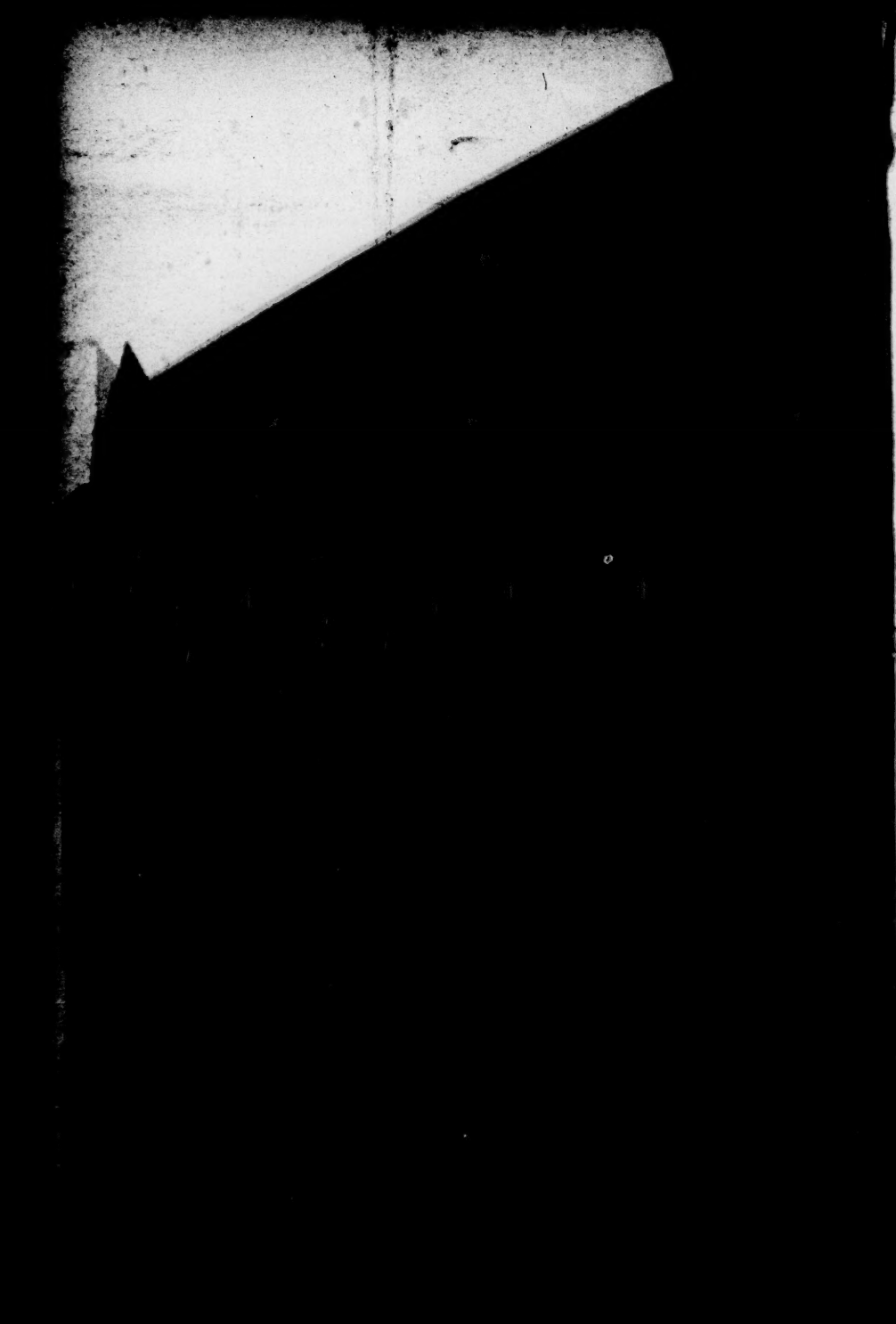
AUSTIN CORBIN, APPELLANT,

vs.

THE COUNTY OF BLACK HAWK ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED SEPTEMBER 29, 1879.



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INDEX.


| | Original. | Print. |
|---|---|---|
| Amended and substituted bill | 2 | 1 |
| Contract for sixteenth section | 30 | 8 |
| Assignment | 34 | 9 |
| Demurrer of Black Hawk County to bill | 38 | 9 |
| Demurrer of D. W. Foote, auditor, *et al* | 41 | 10 |
| Demurrer of George W. Barnard *et al* | 45 | 11 |
| Decree (October 22, 1878) | 48 | 12 |
| Appeal bond | 52 | 13 |
| Original citation | 58 | 14 |
| Acceptance of service | 59 | 14 |
| Certificate of clerk | 61 | 14 |

1 Pleas in the circuit court of the United States of America in and for the district of Iowa, at a term thereof begun and holden at the United States court-room, in the city of Des Moines, in said district aforesaid, on the second Monday of October, the same being the 14 day of October, A. D. 1878, before the honorable John F. Dillon, judge of the United States circuit court for the eighth circuit, and the Hon. J. M. Love, judge of the United States district court for the district of Iowa.

1½ Be it remembered that heretofore, to wit, on the 23d day of July, A. D. 1878, Austin Corbin, by Mess. Brown and Campbell, his solicitors, filed in the clerk's office of the United States circuit court for the district of Iowa his amended and substituted bill of complaint against the County of Black Hawk, in the State of Iowa, and D. W. Foote, auditor of said county, and others, which said amended and substituted bill of complaint is in the words and figures following, to wit:

2 *Further amended and substituted bill.*

In the circuit court of the United States, district of Iowa.

AUSTIN CORBIN, COMPLAINANT,
*vs.*
THE COUNTY OF BLACK HAWK, IN THE STATE of Iowa; D. W. Foote, the auditor of said county; R. A. Whitaker, the treasurer of said county; George W. Barnard, Francis S. Olmstead, Franklin L. Jewell, Samuel H. Rounds, Mathew Cunningham, Sheppard Wilson, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler; Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, Rosaline A. Woodbury, Benjamin C. Moore, J. Q. A. Crosby, A. W. Barber, Elizabeth Sheesley, Elva Sheesley, Mary R. Sheesley, Catherine Sheesley, Minnie Sheesley, Frederick Needeman, J. F. Jeffres, Jessie M. Jarvis, C. E. Covell, James B. Gillmore, Ansel P. Hubbard, Albert Craven, & Henry Owen, def'd's. } In chancery. No. 549.

3 To the honorable the judges of the circuit court of the United States for the district of Iowa:

Austin Corbin, aver'ing that he is a resident of the county of Kings, in the State of New York, and a citizen thereof, and that he was a citizen and resident of the county and State aforesaid at the time of the filing of his original bill of complaint herein, by leave of the court first had and obtained, brings this his amended and substituted bill of complaint against the County of Black Hawk, a public corporation organized and existing under the laws of the State of Iowa, and a citizen thereof, and against D. W. Foote, the auditor of said county (and his successors in office); R. A. Whitaker, the treasurer of said county (and his successors in office); George W. Barnard, Francis L. Olmstead, Franklin L.

Jewell, Samuel H. Rounds, Mathew Cunningham, Sheppard Wilson, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler;
4 Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, Rosaline A. Woodbury, Benjamin C. Moore, J. Q. A. Crosby, A. W. Barber; Elizabeth Sheesley, Elva Sheesley, Mary R. Sheesley, Catherine Sheesley, Minnie Sheesley, heirs at law of John Sheesley, deceased; J. F. Jeffres, Frederick Neideman, Jessee M. Jarves, C. E. Covell, James B. Gilmore, Ansel P. Hubbard, Albert Craven, and Henry Owen, who are now, and were at the time of the filing of the said original bill of complaint herein, residents and citizens of the State of Iowa, in the district aforesaid; and thereupon your orator complains and says that the matter in controversy in this suit exceeds the sum or value of five hundred dollars, exclusive of costs.

Further, your orator represents and shows unto your honors that heretofore, to wit, on the 10th day of July, A. D. 1857, a certain John Kerr, as school-fund commissioner of the said county of Black Hawk, being thereunto duly authorized and empowered by the laws of
5 the State of Iowa, made and entered into a contract in writing with a certain William H. McClure whereby he, the said John Kerr, as school-fund commissioner as aforesaid, bargained and sold to the said William H. McClure the following-described tract or parcel of land, being a portion of section numbered sixteen (16) (or lands in lieu thereof), granted to the State of Iowa for the use of schools by an act of Congress entitled "An act supplemental to the act for the admission of the States of Iowa and Florida into the Union," approved March 3d, 1845, to wit, lots three (3), eleven (11), and twelve (12), that is to say, the north half of the southeast quarter of the northeast quarter and the east half of the southeast quarter of section sixteen (16), in township eighty-nine (89) north, of range fourteen (14) west of the fifth principal meridian, containing one hundred acres, at the price of ten and $\frac{74}{100}$ dollars per acre, amounting to the sum of one thousand
6 and seventy-four dollars, the one-fourth part of which, that is to say, the sum of two hundred and sixty-eight and $\frac{50}{100}$ dollars, was then and there paid by the said William H. McClure unto the said John Kerr, school-fund commissioner, in cash, and for the balance of the said purchase-money the said William H. McClure then and there made and delivered unto the said John Kerr, school-fund commissioner, his promissory note of even date with said contract and payable on or before ten years after date, bearing interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors that on the day and year aforesaid, to wit, on the 10th day of July, 1857, the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain
7 other contract in writing, whereby he bargained and sold unto the said William H. McClure a certain other tract of land, parcel of the said lands so granted to the State of Iowa as aforesaid, that is to say, the east half of the southwest quarter of section sixteen (16), in township eighty-nine (89) north, of range fourteen (14) west of the fifth (5th) principal meridian, at the price of nine dollars per acre; and the said William H. McClure then and there paid to the said John Kerr, school-fund commissioner, the one-fourth part of the said purchase-money in cash, and then and there made and delivered his promissory note for the balance of said purchase-money, payable on or be-

fore ten years after the date thereof, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors
8 that on the day and year aforesaid, to wit, on the 10th day of July, 1857, the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto the said William H. McClure a certain other tract of land, parcel of the said land so granted to the State of Iowa as aforesaid, that is to say, the northeast quarter of section sixteen (16), in township ninety (90) north, of range thirteen (13) west of the fifth (5) principal meridian, at the price of five and $28\frac{3}{100}$ dollars per acre; that the said William H. McClure then and there paid to the said John Kerr, school-fund commissioner, the one-fourth part of the said purchase-money in cash, and then and there made and delivered to the said John Kerr, school-fund commissioner, his promissory note for the balance of the said purchase-money, payable on or before ten
9 years after the date thereof, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors that on the day and year aforesaid, to wit, on the 10th day of July, 1857, the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized and empowered as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto the said William H. McClure a certain other tract of land, being parcel of the lands so granted to the State of Iowa as aforesaid, that is to say, the west half of the southwest quarter of section sixteen (16), in township eighty-nine (89) north, of range fourteen (14) west of the fifth (5) principal meridian, at the price of nine dollars per acre; that the said William H. McClure then and there paid to the said John
10 Kerr, school-fund commissioner, the one-fourth part of the said purchase-money in cash, and made and delivered unto the said John Kerr, school-fund commissioner, his promissory note for the balance of the said purchase-money, payable on or before ten years after the date thereof, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as required by law.

Further, your orator represents and shows unto your honors that on the day and year aforesaid, to wit, on the 10th day of July, A. D. 1857, the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto a certain Abraham Corey a certain other tract of land, parcel of the lands so granted to the State of Iowa as aforesaid, that is to say, the west half of the southeast quarter of section sixteen (16), in township
11 eighty-nine (89) north, of range fourteen (14) west of the fifth principal meridian, at the price of nine and $\frac{05}{100}$ dollars per acre; that the said Abraham Corey then and there paid to the said John Kerr, school-fund commissioner, the one-fourth part of the said purchase-money in cash, and then and there made and delivered to the said John Kerr, school-fund commissioner, his promissory note for the balance of the said purchase-money, payable on or before ten years after the date thereof, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors that afterwards, to wit, on the 20th day of November, A. D. 1857, the said John Kerr, school-fund commissioner as aforesaid, being thereunto
12 duly authorized by law as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto a certain Michael Morris a certain other tract of land, parcel of the lands so granted to the State of Iowa as aforesaid, that is to say, the northwest quarter of section sixteen (16), in township ninety (90) north, of range eleven (11) west of the fifth principal meridian, at the price of five dollars per acre; that the said Michael Morris then and there paid to the said John Kerr, school-fund commissioner, the one-fourth part of the said purchase-money in cash, and then and there made and delivered to the said John Kerr, school-fund commissioner as aforesaid, his promissory note for the balance of the said purchase-money, payable on or before ten years after the date thereof, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

13 Further, your orator represents and shows unto your honors that afterwards, to wit, on the 10th day of July, 1857, the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto a certain Robert M. Cameron a certain other tract of land, parcel of the land so granted to the State of Iowa as aforesaid, that is to say, the east half of the northwest quarter and the northeast quarter of the southwest quarter of section sixteen (16), in township ninety (90) north, of range thirteen (13) west of the fifth principal meridian, at the price of five and $16\frac{2}{3}$ dollars per acre; that the said Robert M. Cameron then and there paid to the said John Kerr, school-fund commissioner, the one-fourth part of the said purchase-money in cash, and then and there made and delivered unto the said John Kerr, school-fund com-
14 missioner, his promissory note for the balance of the said purchase-money, payable on or before ten years after date, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, you orator represents and shows unto your honors that on the day and year last aforesaid the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto a certain Andrew Mullarty a certain other tract of land, parcel of the lands so granted to the State of Iowa as aforesaid, that is to say, the northwest quarter of the southwest quarter of section sixteen (16), in township ninety (90) north, of range thirteen (13) west of the fifth principal meridian, at the price of six $\frac{25}{100}$ dollars per acre; that the said Andrew Mullarty then and there paid unto the said John Kerr, school-fund commissioner as aforesaid,
15 the one-fourth part of the said purchase-money in cash, and then and there made and delivered unto the said John Kerr, school-fund commissioner as aforesaid, his promissory note for the balance of the said purchase-money, payable on or before ten years after the date thereof, with interest at the rate of ten per cent. per annum; and that a record of the said sale was made as provided by law.

Further, your orator represents and shows unto your honors that on the day and year last aforesaid the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he

bargained and sold unto a certain Thomas F. Munger a certain other tract of land, parcel of the said lands so granted to the State of Iowa as aforesaid, that is to say, the southwest quarter of the northwest quarter of section sixteen (16), in township (90) ninety north, of range thirteen (13) west of the fifth principal meridian, at the price of
16 dollars per acre; that the said Thomas F. Munger then and there paid unto the said John Kerr, school-fund commissioner as aforesaid, the one-fourth part of the said purchase-money in cash, and then and there made and delivered unto the said John Kerr, school-fund commissioner as aforesaid, his promissory note for the balance of the said purchase-money, payable on or before ten years after date, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors that on the day and year last aforesaid the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto a certain Mary L. Inman a certain other
17 tract of land, parcel of the said lands so granted to the State of Iowa as aforesaid, that is to say, the south half of the southeast quarter of the northeast quarter of section sixteen (16), in township eighty-nine (89) north, of range fourteen (14) west of the fifth principal meridian, at the price of dollars per acre; that the said Mary L. Inman then and there paid unto the said John Kerr, school-fund commissioner as aforesaid, the one-fourth part of the said purchase-money in cash, and then and there made and delivered unto the said John Kerr, school-fund commissioner, her promissory note for the balance of the said purchase-money, payable on or before ten years after date, with interest at the rate of ten per cent. per annum; and that a record of the said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors
18 that on the day and year last aforesaid the said John Kerr, school-fund commissioner as aforesaid, being thereunto duly authorized as aforesaid, made and entered into a certain other contract in writing, whereby he bargained and sold unto a certain H. W. Pitkins the north half of the northeast quarter of section sixteen (16), in township eighty-nine (89) north, of range fourteen (14) west of the fifth principal meridian, at the price of dollars per acre; that the said H. W. Pitkins then and there paid unto the said John Kerr, school-fund commissioner as aforesaid, the one-fourth part of the said purchase-money in cash, and then and there made and delivered unto the said John Kerr, school-fund commissioner as aforesaid, his promissory note for the balance of the said purchase-money, payable on or before ten years after date, with interest at the rate of ten per cent. per an-
19 num; and that a record of said sale was duly made as provided by law.

Further, your orator represents and shows unto your honors that each of the several persons to whom the said lands were sold as aforesaid made divers payments of money upon their several notes, which payments were then and there credited upon the said notes by the proper officer or officers of the said defendant the County of Black Hawk, but the dates and amounts of the said several payments your orator cannot now here particularly set forth, and the said several promissory notes and the amounts due thereon, are held by the said Black Hawk County as valid and subsisting claims against the makers thereof respectively.

Further, your orator represents and shows unto your honors that by reason of the said hereinbefore-recited premises the said several purchasers, at and upon the execution and delivery of the said several contracts, respectively became the owners of the said several tracts of land; that the legal title to the said lands remained vested in the said County of Black Hawk, and that upon the payment of the balance of the said moneys the said County of Black Hawk was bound to cause the said lands to be conveyed unto the said several purchasers or their assigns.

Further, your orator represents and shows unto your honors that afterwards, after the making and delivering of the said contracts, the said several purchasers, in consideration of divers large sums of money to them paid by your orator, respectively made and delivered unto your orator their respective deeds whereby they respectively conveyed the said several tracts of lands unto your orator, and sold, assigned, and transferred the said several contracts, and all their rights thereunder, unto your orator, which said several conveyances and assignments were duly filed in the office of the said D. W. Foote, the auditor of the said County of Black Hawk, and your orator craves leave to refer to each of the said several conveyances, and he attaches hereto and makes part hereof one of said conveyances from the said William H. McClure, each of the others being in like substance and effect, except the name of the grantor and the description of the lands conveyed, which are severally as hereinbefore set forth; that thereby your orator became and now is the owner of the said several contracts and the said several tracts of land.

Further, your orator represents and shows unto your honors that he has been at all times, and now is, ready and willing to pay to the said county of Black Hawk the full amount remaining unpaid upon the said several promissory notes, that is to say, the balance of the said purchase-money for the said several tracts of land; that on the twelfth (12) day of January, A. D. 1872, he offered to pay to the county auditor of the said County of Black Hawk the full amount remaining unpaid of the said purchase-money of the said several tracts of land; that afterwards, to wit, on the seventh (7th day of October, A. D. 1874, your orator offered and tendered to D. W. Foote, the county auditor of the said County of Black Hawk, and to R. A. Whittaker, the county treasurer of the said County of Black Hawk, the sum of sixteen thousand one hundred and ninety-seven and $\frac{69}{100}$ dollars, in lawful money of the United States of America, as and for the payment of the balance remaining unpaid upon the purchase-money of the said several tracts of land, and all interest thereon, which said sum your orator avers was more than sufficient to to pay off and discharge the said balance of the said purchase-money; that the said officers, and each of them, then and there failed and neglected to accept the said money so tendered, and refused to state whether they accepted or refused to accept the same; that your orator then and there became entitled to demand the issuance of certificates of the payment of the moneys provided to be paid in the said several contracts, and then and there did demand the issuance of the same, which was refused; and that your orator now here brings into court, for the use of the said defendants, the just and full amount of the said money so tendered as aforesaid, to wit, the sum of sixteen thousand one hundred and ninety-seven and $\frac{69}{100}$ dollars, lawful money of the United States, for the purpose of completing and perfecting the said tender, and to enable the said defendant to accept the same, if they elect so to do, at any time; and in case the said

moneys should be found insufficient in amount for the purposes aforesaid, your orator now here offers to pay and bring into court such further sum of money as may be found to be necessary.

Further, your orator represents and shows unto your honors that the said several contracts are valid and subsisting contracts, still remaining in full force and effect, and that they have in nowise been rescinded, annulled, cancelled, forfeited, or set aside; that neither the said County of Black Hawk, nor any of its officers, or any person in its behalf, has ever undertaken to rescind or cancel the said contracts, nor has any notice of such intention to annul, rescind, or cancel the said contracts, or any of them, ever been given to your orator, nor to any of his said assignors and grantors, nor has the said County of Black Hawk, or any of its officers, ever commenced any suit or proceeding to enforce the payment of the said purchase-money, or to foreclose the equities of your orator or his said grantors; and your orator avers that no forfeiture of the said contracts could lawfully be made by the said County of Black Hawk, or any of its said officers. Further, your orator represents and shows that Geo. W. Barnard, Francis S. Olmstead, Franklin L. Jewell, Mathew Cunningham, Sheppard Wilson, Samuel H. Rounds, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler; Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, J. Q. A. Crosby, A. W. Barber, Elizabeth Sheesley, Elva Sheesley, Mary A. Sheesley, Catherine Sheesley, Minnie Sheesley, Frederick Neidman, J. F. Jeffres, Jesse M. Jarvis, C. E. Covell, James B. Gillmore, Ansel P. Hubbard, Albert Craven, and Henry Owen severally claim to have some title to or interest in the above-described lands, or some part thereof; that pursuant to the said last-mentioned sales of the said lands patents have been issued for the said lands, or some of them, to the said defendants, or some of them, by the governor of the State of Iowa; but your orator cannot more particularly state the facts in respect to the issuance of the said patents; and that altogether your orator is the lawful owner of the said several tracts of land. The issuance of the said patents as aforesaid has vested the legal title to the said premises in the patentee or patentees therein named, and the said defendants sometimes allege and pretend that the said contracts of sale last mentioned and the issuance of patents thereunder, as aforesaid, by the governor of the State of Iowa have vested in the said defendants, or some of them, an absolute estate in fee simple in the said lands, notwithstanding the aforesaid prior rights and equities of your orator, but your orator avers that all of the said actings, doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

And your orator craves leave to refer to each of the said several contracts, and attaches hereto and makes part hereof a copy of the said contract so made and entered into with the said Abraham Curey, each of the other of said contracts being in like words and figures, except the name of the purchaser, the description of the land, and the amounts of money therein mentioned, which are severally as hereinbefore set forth.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator solicits the aid of this honorable court in the premises to compel the said defendant true, full, and perfect answers to make to all and singular the statements above set forth, and prays that the said writing of the said word "forfeited" on the record of the said sales may be

decreed to have no force or effect in the premises as against the said estate of your orator; that the said subsequent sale of the said several tracts of land, and all proceedings had or taken in pursuance or execution thereof, including the said patents so issued by the governor of the State of Iowa, and all conveyances of the said lands by the said patentees thereof, be decreed to be void and of no effect as against the estate of your orator; that the title of your orator to the said premises be forever quieted as against the said defendants claiming or to claim any interest or estate in the said lands under the said unlawful acts, doings, and proceedings, and that they and each of them be severally enjoined and restrained from setting up any interest or estate in the said premises under the
29 said sales and the patents issued thereunder; and that the said patentees, and their several grantees, be decreed to hold the legal title to the said lands, and every parcel thereof, so unlawfully acquired as aforesaid, as the trustees of and for your orator, and that they be compelled to convey the same to your orator, upon such terms as to your honors may seem just and equitable; and that your orator may have such further or other relief in the premises as the nature of the circumstances may require, and to this honorable court may seem meet.

(S'g'd) BROWN & CAMPBELL,
*Complainant's Solicitors.*

(S'g'd) J. D. CAMPBELL,
*Of Counsel.*

30 *Contract for 16th section.*

SCHOOL FUND COMMISSIONER'S OFFICE,
*Black Hawk County, July* 10, 1857.

Contract made and entered into between John Kerr, as school-fund commissioner for the County of Black Hawk, Iowa, and Abraham Carey, of the county of Black Hawk and State of Iowa, to wit:

31 The said John Kerr, school-fund commissioner, as authorized by law, has bargained and sold, and by these presents does bargain and sell, to the said Abraham Carey the following-described tract or parcel of land, being a portion of section numbered sixteen (or lands in lieu thereof), granted to the State for the use of schools by an act of Congress entitled "An act supplemental to the act for the admission of the States of Iowa and Florida into the Union," approved March 3, 1845, to wit: Lot No. 10, being the west ($\frac{1}{2}$) half of the south-east ($\frac{1}{4}$) quarter of section sixteen (16), township eighty-nine (89) north, of range fourteen (14) west, containing eighty acres.

The price agreed upon is nine and $\frac{5}{100}$ dollars per acre, amounting to the sum of seven hundred and twenty-four dollars, the one-
32 fourth part of which, to wit, one hundred and eighty-one dollars, has been paid in cash to the said school-fund commissioner, and the balance, to wit, five hundred and forty-three dollars secured by a promissory note bearing even date herewith and payable on or before ten years from date, bearing interest at the rate of ten per centum per annum, payable annually, on the first day of January, at the office of the said school-fund commissioner, in Black Hawk County.

Now, if the said Abraham Carey, his heirs, executors, or administrators, shall pay or cause to be paid the interest on said note as the same falls due, together with the principal within the time specified, then he will be entitled to receive from the governor of the State of Iowa a patent for the land herein described. In case of failure to

make any of the payments aforesaid punctually as stipulated, all previous payments shall be considered forfeited, and the land subject to be sold by the school fund commissioner, or the payment of the
33 money enforced according to law, at the option of said commissioner.

In testimony whereof the parties have hereunto set their hands and seals the day and year first above written.

(Signed) JOHN KERR, [L. S.]
*School Fund Commissioner of Black Hawk County.*
ABRAHAM CAREY.

In presence of—
D. J. COLEMAN.

34 Know all men by these presents that I, Wm. H. McClure, in consideration of the sum of one hundred dollars in hand paid to me by Austin Corbin, of Kings County, State of New York, the receipt whereof is hereby acknowledged, do hereby sell and convey to the said Austin Corbin all the interest in the following-described land, viz: Lots numbers (3) three, eleven (11), and twelve (12), being the north half of the southeast quarter of the northeast quarter and the east half of the southeast quarter of section sixteen (16), township eighty-nine (89) north, of range number fourteen (14) west of the fifth principal meridian, in Black Hawk County, Iowa, which was conveyed to me by a contract, now on file in the office of the county auditor of Black Hawk County, Iowa, made by and between John Kerr, school-fund commissioner of said county, and Wm. H. McClure, for the conveyance of said lands, and I hereby sell and assign to said Corbin all my rights
35 under said contract, covenanting with him that I have not sold, assigned, or transferred the same to any person or persons.

In witness whereof I have hereunto set my hand this 1st day of July, 1871.

WM. H. McCLURE.

In presence of—
DAN'L W. FOOTE.

Endorsed on back as follows:

This assignment filed in my office this 1st day of July, A. D. 1871.
D. W. FOOTE, *Auditor.*

36 (Endorsed:) Austin Corbin vs. Black Hawk Co. No. 549. Eq. Amended and substituted bill. Filed July 23, 1878. (S'g'd) E. R. Mason, clerk.

37 Afterwards, to wit, October 16th, A. D. 1878, the County of Black Hawk, by Parsons and Runnells, its solicitors, filed in said clerk's office its demurrer to said amended and substituted bill, which said demurrer is in the words and figures following, to wit:

38 In the circuit court of the United States in and for the district of Iowa.

AUSTIN CORBIN
*vs.*
THE COUNTY OF BLACK HAWK ET AL.

The County of Black Hawk, by protestation, not confessing or acknowledging all or any of the matters or things in the said further

amended and substituted bill filed by complainant herein on July 23rd, 1878, to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer says:

I. It does not appear upon the said bill of complaint that this court has jurisdiction of the said alleged causes of action or of the parties hereto, or that the complainant's several assignors could have maintained actions in this court against these defendants upon the said several contracts.

39 II. The said bill contains no allegations sufficient to entitle complainant to the equitable relief therein demanded.

III. It appears upon the face of said bill that this action did not accrue within ten years prior to the commencement thereof.

(S'g'd) PARSONS & RUNNELLS,
With BOIES & COUCH,
*Sol's for Resp'd'ts.*

I certify that in my opinion the foregoing demurrer is well founded.

(S'g'd) GALUSHA PARSONS,
*Resp'd's Sol's.*

Affidavit waived.

(Endorsed:) Corbin vs. Black Hawk Co. Demurrer to bill. Parsons & Runnells, sol's for resp'd'ts. Filed Oct. 17, 1878. E. R. Mason, clerk.

40 On the same day, to wit, Octo. 17th, 1878, D. W. Foote, auditor of said Black Hawk County, and R. A. Whitaker, treasurer of the said county, by Parsons and Runnells, their solicitors, filed in said clerk's office their demurrer to said amended and substituted bill in said cause. which said demurrer is in the words and figures following, to wit:

41 In the circuit court of the United States in and for the district of Iowa.

AUSTIN CORBIN
*vs.*
THE COUNTY OF BLACK HAWK & OTHERS.

D. W. Foote, auditor of said county of Blackhawk, and R. A. Whitaker, treasurer of the same, by protestation, not confessing or acknowledging all or any of the matters or things in the further amended and substituted bill of complainant's filed herein July 23d, 1878, to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer say:

I. It does not appear upon the said bill of complaint that this court has jurisdiction of the said alleged cause of action or of the parties hereto, or that the complainant's several assignors could have
42 maintained actions in this court against these defendants upon the said several contracts.

II. The said bill contains no allegations sufficient to entitle complainant to the equitable relief therein demanded.

III. It appears upon the face of said bill that this action did not accrue within ten years prior to the commencement thereof.

IV. It appears upon the face of said bill that said alleged causes of action accrued more than three years prior to the commencement of this action.

V. The title to said lands was at the time of said contracts in the State of Iowa, as the real party in interest, and not in said county, and no action can be maintained against said county or these respondents for a failure by said officers to perform the duties imposed upon them as the agents of the State.

(S'g'd) PARSONS & RUNNELLS,
With BOIES & COUCH,
*For Respondents.*

43 I hereby certify that in my opinion the foregoing demurrer is well founded.

(S'g'd) GALUSHA PARSONS, *Counsel.*

Affidavit waived.

(Endorsed:) Corbin vs. Black Hawk County. Demurrer to bill. Parsons & Runnells, sol's for resp'd'ts. Filed Oct. 17, 1878. E. R. Mason, clerk.

44 On the same day, to wit, October 17th, A. D. 1878, George W. Barnard and the remaining defendants in said bill, by Parsons and Runnells, their solicitors, filed in said clerk's office their demurrer to said amended and substituted bill in said cause, which said demurrer is in the words and figures following, to wit:

45 In the circuit court of the United States in and for the district of Iowa.

AUSTIN CORBIN
*vs.*
THE COUNTY OF BLACK HAWK & OTHERS.

All the respondents named in the further amended and substituted bill of the complainant filed herein July 23, 1878, excepting the County of Black Hawk, and the auditor and treasurer thereof, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill to be true in such manner and form as the same are alleged and set forth therein, demur thereto, and for cause of demurrer say:

I. It does not appear from the said bill of complaint that this court has jurisdiction of the said alleged causes of action or of the parties hereto, or that the complainant's several assignors could have maintained actions in this court against these defendants upon the said several contracts.

46 II. The said bill contains no allegations sufficient to entitle the complainant to the equitable relief therein demanded.

III. It appears upon the face of said bill that this action did not accrue within ten years prior to the commencement thereof.

(S'g'd) PARSONS & RUNNELLS,
With BOISE & COUCH,
*Att'ys for Resp'ts.*

I hereby certify that in my opinion this demurrer is well founded.

(S'g'd) GALUSHA PARSONS, *Counsel.*

Affidavit waived.

(Endorsed:) Corbin vs. Black Hawk Co. Demurrer to bill. Parsons & Runnells, sol's for resp'd'ts. Filed Oct. 17, 1878. E. R. Mason, clerk.

47 Afterwards, to wit, on the 22d day of October, A. D. 1878, the same being of the October term of said court, there appears on the records of the proceedings thereof in said cause the following decree, to wit:

48 *Decree.*

In the circuit court of the United States, district of Iowa, October term, 1878.

TUESDAY, *October* 22, 1878.

AUSTIN CORBIN
*vs.*
THE COUNTY OF BLACK HAWK, IN THE STATE of Iowa; D. W. Foote, auditor of said county; R. A. Whitaker, treasurer of said county; George W. Barnard, Francis S. Olmstead, Franklin L. Jewell, Samuel H. Rounds, Mathew Cunningham, Sheppard Wilson, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler; Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, Rosaline A. Woodbury, Benjamin C. Moore, J. Q. A. Crosby, A. W. Barber, Elizabeth Sheesley, Elva Sheesley, Mary R. Sheesley, Catherine
49 Sheesley, Minnie Sheesley, Frederick Neideman, J. F. Jeffres, Jesse M. Jarvis, C. E. Covel, James B. Gillmore, Ansel P. Hubbard, Albert Craven, and Henry Owen, defendants.

N.o 549. Eq.

This cause having come on for hearing on this 22 day of October, A. A. 1878, upon the demurrer of the said defendant to the complainant's amended and substituted bill of complaint, filed July 23, 1878 (and the court having declined to hear argument upon any of the questions raised by the demurrer except the question of jurisdiction), and having heard the arguments of counsel (as to the said question), and being fully advised in the premises, it is considered by the court and ordered, adjudged, and decreed that the said complainant's bill of complaint, as the same now stands amended, be, and the same is hereby, dismissed (for that this court hath no jurisdiction of the said cause), and that the said defendants do have and recover of the complainant herein
50 their costs in this suit, taxed at $ . And the said complainant alleging that he is aggrieved by the said decree dismissing his said amended & substituted bill, prays that an appeal to the Supreme Court of the United States be allowed, and it appearing to the court that the matter in dispute in this suit, exclusive of costs, exceeds the sum or value of five thousand dollars, it is ordered that the said appeal be, and the same is hereby, allowed; and with the consent of the defendants, it is ordered that if the said complainant shall file a bond, with sureties to be approved by one of the judges of this court, in the sum of $1,000, within sixty days, exclusive of Sundays, from this October, 1878, the said appeal shall operate as a supersedeas.

(S'g'd) JOHN F. DILLON.
" J. M. LOVE.

51 Afterwards, to wit, December 17th, A. D. 1878, there was filed in said clerk's office, by said complainant in said cause, an appeal bond, which said appeal bond is in the words and figures following, to wit:

52 In the Supreme Court of the United States.

AUSTIN CORBIN
*vs.*
THE COUNTY OF BLACK HAWK, IN THE STATE of Iowa; D. W. Foote, auditor of said county; R. A. Whittaker, treasurer of said county; George W. Barnard, Francis S. Olmstead, Franklin L. Jewell, Samuel H. Rounds, Mathew Cunningham, Sheppard Wilson, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler; Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, Rosaline A. Woodbury, Benjamin C. Moore, J. Q. A. Crosby, A. W. Barber, Elizabeth Sheesley, Elva Sheesley, Mary R. Sheesley, Catherine Sheesley, Minnie Sheesley, Frederick Neideman,
53 J. T. Jeffers, Jesse M. Jarvis, C. E. Covel, James B. Gillmore, Ansel P. Hubbard, Albert Craven, and Henry Owen.

No. 549. In chancery. Circuit court, district of Iowa.

54 Know all men by these presents that we, Austin Corbin, of the county of Kings, in the State of New York, as principal, and George S. C. Dow, of the same county and State, as sureties, are held and firmly bound unto the County of Black Hawk, in the State of Iowa; D. W. Foote, auditor of said county; R. A. Whittaker, treasurer of said county; George W. Barnard, Francis S. Olmstead, Franklin L. Jewell, Samuel H. Rounds, Mathew Cunningham, Sheppard Wilson, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler; Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, Rosaline A. Woobury, Benjamin C. Moore, J. Q. A. Crosby, A. W. Barber, Elizabeth Sheesley, Elva Sheesley, Mary R. Sheesley, Catherine Sheesley, Minnie Sheesley, Frederick Neidman, J. T. Jeffres, Jesse M. Jarvis, C. E. Covel, James B. Gillmore, Ansel P. Hubbard, Albert Craven, and Henry Owen, the defendants in the above-entitled cause, in the sum of one thousand dollars, to be paid unto them, their executors or administrators, to which
55 payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 7th day of December, 1878.

Whereas the above-named Austin Corbin hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Iowa:

Now the condition of this obligation is such that if the above-named Austin Corbin shall prosecute his said appeal with effect, and answer all costs and damages if he shall fail to make good his plea, then this

obligation shall be void; otherwise to remain in full force and virtue.
(S'g'd) A. CORBIN.
( " ) GEO. S. C. DOW.

Sealed and delivered in presence of—
[SEAL.] (S'g'd) J. D. CAMPBELL.

56 Approved by me this 16th day of December, 1878.
(S'g'd) JOHN F. DILLON, *Judge.*

(Endorsed:) In U. S. circuit court, district of Iowa. Austin Corbin, appellant, vs. The County of Black Hawk & others. Bond on appeal to the Supreme Court of the United States. Filed Dec. 17, 1878. E. R. Mason, clerk.

57 On the same day, to wit, December 17th, 1878, Austin Corbin, by his solicitors, Mess. Brown and Campbell, filed in said clerk's office a citation, which said citation, with the return of service endorsed thereon, is herewith returned:

58 By the honorable John F. Dillon, one of the judges of the circuit court of the United States for the district of Iowa, to the County of Black Hawk, in the State of Iowa; D. W. Foote, auditor of said county; R. A. Whittaker, treasurer of said county; George W. Barnard, Francis S. Olmstead, Franklin L. Jewell, Samuel H. Rounds, Mathew Cunningham, Sheppard Wilson, Henry Bentz, H. H. Carpenter, Jacob Kyler, Joshua Kyler; Cornelia A. Miller, administratrix of the estate of Edmund Miller, deceased; L. B. Hoyt, Thomas C. Edman, Rosaline A. Woodbury, Benjamin C. Moore, J. Q. A. Crosby, A. W. Barber, Elizabeth Sheesley, Elva Sheesley, Mary R. Sheesley, Catherine Sheesley, Minnie Sheesley, Frederick Neidman, J. F. Jeffers, Jesse M. Jarvis, C. E. Covel, James B. Gilmore, Ansel P. Hubbard, Albert Craven, and Henry Owen:

Whereas Austin Corbin lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Iowa, made in your favor, and has filed the security required by law: You and each of you are
59 therefore hereby cited and admonished severally to appear before the said Supreme Court of the United States, at the next term thereof, to be begun and held in the city of Washington, on the second Monday of October next (1879), then and there to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of *of* St. Paul, in the district of Minnesota, in the eighth circuit, this 16 day of December, 1878.
JOHN F. DILLON, *Judge.*

Service accepted Jan'y 10th, 1879.
GALUSHA PARSONS,
*Sol. for Resp'ts.*

60 (Indorsed:) In U. S. Supreme Court. Appeal from district of Iowa. Austin Corbin, appellant, vs. The County of Black Hawk et als. Citation. Filed Dec. 17, 1879. E. R. Mason, clerk.

61 In the circuit court of the United States for the district of Iowa.

I, Ed. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains full, true, and complete

copies of the amended and substituted bill of complaint, the defendants' demurrers thereto, the decree and appeal bond, in a certain cause wherein Austin Corbin is complainant and the County of Black Hawk and others are defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation, with the return of service endorsed thereon, is herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in Des Moines, in said district, this 20th day of Sept., A. D. 1879.

[SEAL.]

ED. R. MASON,
*Clerk U. S. C. C., District of Iowa.*

(Indorsement on cover:) No. 271. Austin Corbin, appellant, vs. The County of Black Hawk et al. Iowa C. C. U. S. Filed 29th September, 1879.

OFFICE SUPREME COURT U.S.
FILED
APR 1 1882
JAMES H. McKENNEY, Clerk

EVENING POST JOB PRINTING OFFICE, 208 B'way, N. Y.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1882.

AUSTIN CORBIN,
*Appellant,*
*vs.*
THE COUNTY OF BLACKHAWK ET AL.
*No.* 271.

## Appeal from the Circuit Court of the United States for the District of Iowa.

*Statement of the Case and Brief of Argument for Appellant.*

JAMES D. CAMPBELL, *of Counsel.*

## Statement of the Case.

In the court below this case turned wholly upon the question of jurisdiction which arose upon the demurrer of the defendants to the complainant's amended and substituted bill of complaint (*Record, p.* 10). The decree dismissing the complainant's bill contains the following:

"This cause having come on for hearing on the 22d day of October, A. D. 1878, upon the demurrer of the said defendants to the complainant's amended and substituted bill of complaint, filed July 3, 1878 (and the court having declined to hear argument upon any of the questions raised by the demurrer, except the question of jurisdiction), and having heard the arguments of counsel (as to the said question), and being fully advised in the premises, it is considered by the court, and ordered, adjudged and decreed, that the said complainant's bill of complaint, as the same now stands amended, be and the same is hereby dismissed, for that this court has no jurisdiction of the said cause." (*Record, p.* 12.)

According to the precedent established by this court in *McDonald* v. *Smalley*, 1 Peters, 620, appellant takes it for granted this court will consider nothing but the question of jurisdiction passed upon by the court below. In the report of the case cited the following note appears:

"Before argument commenced the counsel for both parties asked instructions of the court upon the question whether, as the record contained the whole of the proceedings in the cause and exhibited all the matters either party required for a final disposition of the case in this court, upon all the points in the controversy, this court would permit the argument to go to the whole case, so that a decree could be given here upon the whole case; or whether, an opinion upon the jurisdiction only having been given in the Circuit Court, the argument should be confined to that question. The court having advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the court from which the appeal had been taken."

The order entered by the Supreme Court is in the following terms:

"This case came on, etc., and was argued on the point of jurisdiction. On consideration whereof, this court is of opinion that there is error in the decree of said Circuit Court dismissing the complainant's bill. It is therefore decreed and ordered by this court, that the decree of said Circuit Court in this cause be, and the same is hereby reversed and annulled. And it is further ordered that the same be remanded to the said Circuit Court for further proceedings to be had thereon according to law and justice."

Confining the statement of the case, therefore, to the question of jurisdiction, the following are the important matters to be considered:

Under the provisions of the Act of Congress, approved March 3, 1845, supplemental to the "Act for the admission of the States of Iowa and Florida into the Union." "Section numbered 16, in every township, of the public lands" was granted to these states for the use of schools.

By an act of the Legislature of the State of Iowa, approved February 25, 1847 (Code 1851, sec. 1048), provision was made for the sale of these lands by an officer to be elected in each county, styled the "Fund Commissioner."

Sec. 1048: "The Fund Commissioners of the respective counties, having received the allotment and appraisement of any or all of the sections 16, or lands granted in lieu thereof, shall, after giving 30 days notice by written or printed advertisements in three of the most public places in the county, and one in the township wherein the land is situated, proceed to sell such land to the highest and best bidder upon the following terms, to wit: one fourth of the purchase money in advance, and the balance on a credit not exceeding ten years, bearing interest at the rate of ten per cent. per annum, from the day of sale until paid, payable annually at the office of said Fund Commissioner. Lands assessed as aforesaid shall not sell for less than their appraised value. The Fund Commissioner shall receive, when desired by the purchaser, the whole of the purchase money in advance."

In case full payment should be made in cash it was provided as follows:

Sec. 1049: "If the purchaser pay the money in hand, the Fund Commissioner shall give him, upon the receipt thereof, a certificate of purchase which shall entitle him to a patent, which patent shall be issued by the Governor."

In case of sales made upon a partial credit, it was further provided as follows:

Sec. 1050: "If the lands be purchased upon a partial credit as hereinbefore mentioned, the contracts shall be forthwith reduced to writing, signed by the parties, and forthwith recorded in the office of said commissioner, and thence during the continuance of such contract, it shall be lawful for such purchaser

or his assignee, at any time, to pay the principal and interest due upon said contract, and receive a certificate of purchase as mentioned in the preceding section.

It was also provided in case the purchaser should make default in the payment of interest, as follows:

Sec. 1052. If any person fail to pay the interest due upon any contract, as hereinbefore mentioned, it shall be lawful for the Fund Commissioner, in his discretion, either to consider the contract as forfeited and proceed to sell the land anew upon the terms prescribed in the 5th section of this act, or to collect the same by suit.

Such being the state of the law, John Kerr, Esq., School Fund Commissioner of Blackhawk County, July 10, 1857, sold to Abraham Carey, lot No. 10, Cedar Falls Township, being the west ½ of the southeast ¼ of section 17, township 89, range 14, west of the fifth principal meridian, for $9.05 per acre. Carey paid $181 in cash, giving his note for $543 and a contract, as contemplated by law, was entered into in the following form: (Record, pp. 3 and 8.)

*Contract for 16th Section.*

"SCHOOL FUND COMMISSIONER'S OFFICE,
"Blackhawk County, July 10, 1857,

"Contract made and entered into between John Kerr, as School Fund Commissioner for the county of Blackhawk, Iowa, and Abraham Carey, of the County of Blackhawk, and State of Iowa, to wit: The said John Kerr, School Fund Commissioner, as authorized by law, has bargained and sold, and by these presents does bargain and sell to the said Abraham Carey, the following described tract or parcel of land, being a portion of section numbered sixteen, (or lands in lieu thereof), granted to the State for the use of schools, by an act of Congress entitled 'An Act supplemental to the act for the admission of the States of Iowa and Florida into the Union,' approved March 3, 1845, to wit: Lot No. 10, being the west (½) half of the southeast (¼) quarter of section sixteen (16), township eighty-nine (89), north of range fourteen (14), west, containing eighty acres.

"The price agreed upon is 9 and 5-100 dollars per acre, amounting to the sum of seven hundred and twenty-four dollars, the one-fourth part of which, to wit, one hundred and eighty-one dollars, has been paid in cash to the said School

Fund Commissioner, and the balance, to wit, five hundred and forty-three dollars, secured by a promissory note bearing even date herewith, and payable on or before ten years from date, bearing interest at the rate of ten per cent. per annum, payable annually on the first day of January, at the office of the said School Fund Commissioner in Blackhawk County.

"Now, if the said Abraham Carey, his heirs, executors or administrators shall pay or cause to be paid the interest on said note, as the same falls due, together with the principal, within the time specified, then he will be entitled to receive from the Governor of the State of Iowa, a patent for the land herein described. In case of failure to make any of the payments aforesaid, punctually as stipulated, all previous payments shall be considered forfeited, and the land subject to be sold by the School Fund Commissioner, or the payment of the money enforced according to law, at the option of said commissioner.

"In testimony whereof, the parties have hereunto set their hands and seals, the day and year first above written.

"(Signed) JOHN KERR, [L. S.]
"*School Commissioner of Blackhawk County,*
"ABRAHAM CAREY.

"In presence of
"D. J. COLEMAN."

The record shows that Carey made divers payments of money upon his notes, which were credited on the notes by the proper officer of the county (Record, page 5). Afterwards Carey, for valuable consideration, made his deed conveying the land, and assigned and transferred his contract, and all his rights thereunder, to the complainant. The deed and assignment were filed in the office of defendant Foote, the auditor of the County of Blackhawk (Record, page 6).

After the contract was entered into, and before default of any payment occurred, the Act of February 9, 1858, (ch. 9, Laws of the Seventh General Assembly) was passed as follows:

Section 1. Be it enacted by the General Assembly of the State of Iowa, that so much of section 1052 of the Code (1851) as authorizes School Fund Commissioners to declare contracts for school lands forfeited, where the interest on the same has not been paid, and further authorizes them to sell said lands anew, be and the same is hereby repealed.

Subsequently, by act of March 23d, 1858 (ch. 158, Laws of the Seventh General Assembly) the School Fund Commissioner was

abolished and the management of the school fund, the sale of school lands, etc., were placed in the hands of the county judge, with the concurrence of the township trustees and the county treasurer. This act provides an elaborate system for the management and control of the school fund and lands, and is too voluminous to be set forth here *in extenso*. By the terms of this latter act it was provided that:

Section 16. Whenever any purchaser of any school lands, sold under the provision of this act, who has purchased the same under a partial credit, or any person to whom a portion of the school fund has been loaned, fails to pay the interest thereon according to the terms of his contract, on the first day of January, he shall incur a penalty of two per cent. upon said interest; and, in case he shall fail to pay said interest on or before the first day of February, he shall incur an additional penalty of two per cent. on said interest; and in like manner an additional penalty of two per cent. shall be incurred for every month any delinquent may fail to pay the interest due from him, until the same is paid; and if said interest is not paid at the end of six months, it shall be the duty of the County Treasurer to report the name of the delinquent to the District Attorney of the Judicial District, in which the county is situated, who shall immediately commence a suit for the collection of the said interest.

But, by an act of March 31, 1860 (Revision 1860, page 355), it is provided as follows:

Section 1997. That hereafter no greater sum shall be charged or collected either as interest, or as a penalty for the non-payment of interest, on any money due or to become due to any of the school funds of this State, than ten per cent. per annum, and all sums due as a penalty for non-payment to any such school fund, by virtue of section 16, chap. 158 of the Acts of the Seventh General Assembly, whether for lands sold, money loaned or otherwise, are hereby relinquished and released to the persons so liable to pay the same.

By Section 1999 of the Revision, the provisions of section 16 of chapter 158 of the Acts of the Seventh General Assembly were specifically repealed, leaving in force therefore, the provisions of section 1975 of the Revision of 1860, as the only means provided by statute for enforcing payment against delinquent debtors to the school fund.

This latter section is in the following words:

Section 1975. Whenever any purchaser of any school land sold under the provisions of this act, upon a partial credit, or any person to whom a portion of the school funds has been loaned, fails to pay the interest upon the amount due the school fund from him on the first day of January, and said payment is not made within six months thereafter, then and in that case, the entire amount both of principal and interest, owing to the school fund from such person, shall be deemed to have become due, and the Clerk of the District Court shall report the name of the delinquent, together with the sum total due from such delinquent to the District Attorney of his judicial district, who shall immediately commence a suit for the collection of the amount thus reported. The provisions of this section, in so far as they provide for the principal owing for the purchase of school lands, or for money borrowed from the school fund, becoming due and being collected at an earlier day than that stipulated in the contract, upon failure to pay the interest, are hereby declared to be a part of every contract made under and by virtue of this act, whether expressed in said contract or not.

For the purpose of conforming the statutes to the provisions of the new Constitution of 1857, by the Act of April 3, 1860. (chap. 86 of the Revision.) "An Act providing for the management of the school fund and the sale of school lands," the Board of Supervisors were charged with the duties which had been imposed upon the County Judge, under the Act of 1858; the Clerk of the District Court, being *ex-officio* the Clerk of the Board, was charged with all mere clerical duties. By the Act of April 8, 1862, (Laws of 1862, p. 168) it was provided that, after the publication of notice by the clerk, in case any persons, holding lands under contract, should neglect to pay the sum due thereon, or make arrangements for an extension of time, within three months from the publication of notice, the Board of Supervisors might cause suit to be brought and prosecuted. By section one of this act, it was provided that the whole management of the securities should be vested in the Board of Supervisors, in the respective counties; and by section nine the legal title to the securities was vested in the county.

At the same time with the Carey contract, other contracts, precisely similar in form and substance, were entered into for the sale of the other school lands in Blackhawk County, in

respect to which all the facts existed, as above stated in respect to the Carey contract, including the assignment to complainant.

The plaintiff avers in his bill (Record, p. 6.) that he has been "at all times, and now is ready and willing to pay the county of Blackhawk the full amount remaining unpaid upon the said several promissory notes, that is to say, the balance of the said purchase money for the said several tracts of land;" that on the 12th day of January, 1872, he offered to pay to the County Auditor of the county of Blackhawk the full amount remaining unpaid of the said purchase money for the said several tracts of land, and that afterwards, October 7th, 1874, he offered and tendered to D. W. Foote, the County Auditor of the said county of Blackhawk and to R. A. Whittaker, County Treasurer of the said county, the sum of sixteen thousand one hundred and ninety-seven and $\frac{69}{100}$ dollars, lawful money of the United States as and for the balance remaining unpaid upon the purchase money, of the said several tracts of land and of the interest thereon, which sum he avers is more than sufficient to pay off and discharge the said balance of the said purchase money. That the said officers, and each of them, failed and neglected to accept said money, and refused to state whether they accepted or refused to accept the same. The bill further alleges (Record p. 6,) that the complainant became entitled to demand the issuance of a certificate for the payment of the moneys, provided to be paid in the said several contracts, and did then and there demand the issuance of the same which was refused. The bill further states "and that your orator now here brings into court for the use of the said defendants the just and full amount of the said moneys so tendered as aforesaid to wit: the sum of sixteen thousand one hundred and ninety-seven and $\frac{69}{100}$ dollars, lawful money of the United States, for the purpose of completing and perfecting the said tender, and to enable the defendants to accept the same if they elect so to do at any time. The bill further alleges (Record p. 7,) "that the said several contracts are valid and subsisting contracts, still remaining in full force and effect, and that they have in nowise been annulled, rescinded, cancelled, forfeited or set aside. That neither the said county of Blackhawk, nor any of its officers, nor any person in its behalf, has ever undertaken to rescind or cancel the said contracts, nor has any notice of such intention to annul,

rescind or cancel the said contracts, or any of them, ever been given to your orator, nor to any of his said assignors or grantors, nor has the said county of Blackhawk, nor any of its officers, ever commenced any suits or proceeding to enforce the payment of the said purchase money, or to foreclose the equities of your orator, or his said grantors; and your orator avers that no forfeiture of the said contracts could lawfully be made by the said county of Blackhawk, or any of its said officers."

Some of the county officers having, without any proceedings whatsoever, and without any authority of law, assumed to take these contracts as being forfeited, and having entered into other contracts for the sale of these lands, refused to accept the tender made by the complainant. The purchasers under these latter contracts, having, before the commencement of this suit, completed their payment for the lands, received final certificates, and obtained patents from the Governor. In 1872, the present complainant, after making the tender and demand first above mentioned, commenced actions at law against the several parties in possession of the lands; but, the cases having been removed to the Circuit Court of the United States, it was held that the plaintiff's remedy was in equity. The suits were therefore dismissed, without prejudice to plaintiff's right to file this bill.

Accordingly, in November, 1874, having first made due tender, as above mentioned, the complainant filed his bill in the present suit, setting up the facts above stated, making defendants, the county of Blackhawk, the legal owner of the tracts, the County Auditor, whose legal duty it was to issue the certificate of final payment; the County Treasurer, who is by law made the recipient of the money, and also the several claimants of the lands under the subsequent contracts. In the bill originally filed, the complainant alleged that he was a citizen and resident of the State of New York, and that defendants were, severally, citizens and residents of the State and District of Iowa—without, however, disclosing the residence and citizenship of his several assignors—and the allegations were renewed in due form in the amended bill. The defendants answered the original bill, and the case proceeded until it was almost ripe for final hearing, when the complainant obtained leave to file an amended and substituted bill, for the

purpose of conforming the pleadings to the state of the proofs. Instead of answering the amended bill, as they had done in respect to the original bill, the defendants interposed a demurrer, raising for the first time, amongst other questions, this question of jurisdiction. It will be observed that the prayer of the amended bill is as follows:

"That the said writing of the said word 'forfeited,' on the record of the said sales, may be decreed to have no force or effect in the premises as against the said estate of your orator. That the said subsequent sales of the said several tracts of land and all the proceedings had or taken in pursuance or execution thereof, including the said patents so issued by the Governor of the State of Iowa, and all conveyances of said lands by the patentees thereof, be decreed to be void and of no effect as against the estate of your orator. That the title of your orator to the said premises be forever quieted as against said defendants claiming or to claim any interest or estate in the said lands under the said unlawful acts, doings and proceedings; and that they, and each of them, be severally enjoined and restrained from setting up any interest or estate in the said premises, and the said sales under the patents issued thereunder. And that the said patentees and their several grantees be decreed to hold the legal title to said lands and every parcel thereof, so unlawfully acquired, as aforesaid, as the trustees of and for your orator, and that they be compelled to convey the same to your orator upon such terms as to your Honors may seem just and equitable."

Then follows the prayer for other and further relief.

Counsel desires to state that by some unaccountable clerical error there seems to have been omitted from this record a paragraph which, though necessary fully to appreciate the significance of the allegations of the bill, is not technically necessary for the consideration of the questions now before the court. Complainant has filed for the convenience of the court a copy of the first amended bill, filed by the complainant, in which, in addition to the allegations of the amended bill, above quoted, the following appears:

"But your orator states that, at some time to your orator unknown, but at a day subsequent to the first day of January, 1861, one D. J. Coleman, as your orator is informed and believes, or some other person to your orator unknown, wrote upon the records of the sales of said lands and opposite each piece thereof the word 'forfeited;' that said writing of said

word 'forfeited' was done without any authority from any person or board or from said county, or any act, doing or declaration of forfeiture whatsoever, and was without authority both in fact and in law."

So much of the demurrers as raises the question of jurisdiction are substantially in the following words (Record, p. 10):

I.—It does not appear upon the said bill of complaint that this court has jurisdiction of the said alleged cause of action, or of the parties hereto, or that the complainant's several assignors could have maintained actions in this court against these defendants upon the said several contracts.

The demurrer raises the point that, since the complainant sues in the character of an assignee, the case comes within the proviso contained in the Revised Statutes, 1874, sec. 629, and that the bill should show affirmatively that complainant's assignors could have prosecuted the suit here, if no assignment had been made.

The complainant contends, on the other hand, that the proviso above mentioned does not describe cases like the present and is wholly inapplicable, because this is in no sense a "suit to recover the contents of any promissory note or other chose in action," and is not even founded upon the contracts, but is *essentially a suit to determine the validity, force and effect of certain transactions subsequent to the making of the contracts, whereby certain rights are claimed to have arisen adverse to those existing under the contracts.*

We have thus taken pains, in the foregoing statement of facts, to present to the court the statute provisions under which these contracts were made, together with those in force at the time the acts complained of were committed. An examination of these statutes will show that it has been at all times, and still is, the policy of the Legislature of the State of Iowa to control, by direct statutory provisions, the disposition of the lands granted to the State for school purposes, and to leave but little, if anything, to the discretion of the officers having the matter in charge. From this examination, too, the nature of this suit will be clearly apparent.

To generalize briefly the situation of the controversy, we

have this state of facts: The School Fund Commissioner, being the officer then in charge of that duty, made contracts in form and substance conforming to the directions of the law then in force, with the complainant's several assignors, for the sale of a large portion of the school lands, in Blackhawk County. At the time the contracts were entered into, the law provided that a failure on the part of the purchaser to pay the purchase money, or any installment of interest, should work a forfeiture of the rights of the purchaser at the option of the School Fund Commissioner. If he was so advised, he was authorized to prosecute a suit for the collection of the delinquent payments. These purchasers, it seems, were delinquent in making some of their payments, but before the School Fund Commissioner had exercised the option which was given him by the law (and the terms of the contracts) his office was abolished and his powers and duties were vested in other officers—subsequently in the Board of County Commissioners. The abolition of the office of School Fund Commissioner took place before there was any default under these contracts.

Later on, after the entire charge and management of the school lands had passed into the hands of the Board of County Commissioners, after the repeal of the law authorizing the forfeiture of the contracts for default in payments; without any action whatsoever on the part of those officers who had charge of the matter, the clerk of the board undertook to enter into new contracts for the sale of these identical lands to other purchasers—the rights and interests of the original purchasers being utterly ignored. The new purchasers having, as we claim, without authority of law obtained the contracts above referred to, completed their purchases and obtained from the Governor patents for the lands under the statutes, and thereby became vested with the legal title, whereby the original purchasers are unable to assert their estate and interest at law, as has already been decided in the Circuit Court.

Desiring to complete his title, the complainant tendered the deferred payments and accrued interest to the proper officers and demanded certificates of payment. The officers refused to receive the money and to issue the certificates which would enable the Governor to issue patents and enable the complainant to assert his title at law.

This suit was brought, therefore, to determine the right of

the school fund officers to make the subsequent contracts, while the contracts under which the complainant claims still remained in force, and, if no such right existed, to obtain the decree of the court cancelling and annulling the contracts subsequently entered into, and restraining the parties claiming under them from asserting any interest or claim under these subsequent contracts adverse to the rights of the complainant; and further, to determine whether the officers of Blackhawk County have any right or authority under the law to declare these contracts forfeited; if they have such right and power, whether it has been exercised as a matter of fact if any such right never existed, or if it was never exercised to declare and establish the existence and binding force of the complainant's contracts; and to declare the technical legal titles to the lands, thus unlawfully acquired, to be held in trust for the complainant.

### Assignment of Errors.

And the said appellant says there is manifest error on the face of the record, for that—

*First.*—The Circuit Court erred in sustaining the defendant's demurrer to the complainant's bill of complaint.

*Second.*—The Circuit Court erred in dismissing the complainant's bill of complaint.

*Third.*—The Circuit Court erred in dismissing the complainant's bill of complaint on the merits, when the same should only have been dismissed for want of jurisdiction without prejudice.

## Brief of Argument.

### I.

*This suit is not excluded from the cognizance of the Circuit Court by the restriction contained in the 11th section of the Judiciary Act, nor by the proviso contained in section 629 of the Revised Statutes of 1874.*

1. It may tend to aid in the construction of these acts of Congress, to regard the precise language of the Constitution with that of the acts themselves.

Article III, sec. 2 of the Constitution: "The judicial power" (of the United States) "shall extend to * * * controversies between citizens of different States."

The law in force at the commencement of this suit is found in

Revised Statutes, 1874, sec. 629: "The Circuit Court shall have original jurisdiction as follows:

Of all suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars," and * * * "the suit is between a citizen of the State where it is brought, and a citizen of another State: *provided* that no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

This section is intended to be a revision of a part of the 11th section of the Judiciary Act of 1789, which, so far as it affects the question now before the court, is in the following language:

"The Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars" * * * where (or) "the suit is between a citizen of the State where the suit is brought, and a citizen of another State" * * * "Nor shall any" * * * "Circuit Court have any cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no aasignment had been made."

2. The opinion of the majority in the case of *Deshler* v. *Dodge*, 16 Howard, 630, clearly illustrates the contention of the complainant upon this question. NELSON, *J.*, delivering the opinion of the court, says:

"The only question presented in the case by either of the parties is, whether or not the court below had jurisdiction of the case within the true meaning of the 11th section of the Judiciary Act of 1789." * * * "It is admitted

the assignors in this case could not have maintained the suit in the Federal Courts. We are of opinion that this clause of the statute has no application to the case of the suit by the assignee of a chose in action to recover the possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents or to enforce the contract contained in the instrument assigned.

In the case of a tortious taking or wrongful detention of a chose in action against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title. It is sufficient if it belongs to the party bringing the suit at the time of the injury.

The distinction as it respects the application of the 11th section of the Judiciary Act to a suit concerning a chose in action is this—where the suit is brought to enforce the contract, the assignee is disabled, unless it might have been brought in the court if no assignment had been made; but if brought for a tortious taking or wrongful detention of a chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in the case of a like wrong in respect to any other sort of personal chattel.

The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring suit in the Federal Courts if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not within this section, but if brought to enforce the payment or collection of the debt by sale of the premises, or by decree against the mortgagor, then the assignee is disabled unless the like suit could have been maintained by the mortgagee."

3. So, in the case at bar, while, as a matter of fact, the complainant appears to be an assignee of what may or may not be technically called *a chose in action*, yet it is plain that he has not commenced, and does not now prosecute this suit in his character of assignee. He sues and prosecutes in this case, because in his own person and in his own right a cause of action has accrued to him through the act and conduct of these officers—in their refusal to accept the moneys tendered by him in payment of the balance due upon the purchase money of these lands, and by their assertion of an adverse title on the part of the other defendants, and through the consequences

of those acts. Therefore, we say that more clearly than in any of the cases in which it has been held by this court, and by the several circuits, that the limitation of restriction contained in the 11th section of the Judiciary Act was not operative to defeat the jurisdiction of the Circuit Courts, this complainant has the right to maintain this action within the Federal jurisdiction.

4. But we contend also that, even in respect to the wrongful acts alleged to have been committed by the defendants, or some of them, *prior* to the assignments made to the complainant, this complainant has the right to sue, because, in respect to these acts, he is not suing to recover the "contents of a promissory note or other chose in action;" he is suing simply to determine the validity, force and effect of these transactions which have transpired subsequent to the making of the contracts, and under which certain rights claimed to have arisen adverse to those existing under the contracts. In other words, except in an incidental way, we ask no relief under these contracts, but we do ask relief against the subsequent wrongful and unlawful acts of others, the consequences of which are now asserted against us, and stand in the way of our obtaining our rights according to the ordinary course of the common law. These contracts and these assignments are simply set up for the purpose of showing to the court our interest in these lands, and of showing a right to complain of these subsequent proceedings which we seek to set aside and annul—to show to the court that we are not mere volunteers in a controversy in which we have no interest.

5. It may not be amiss here to observe that the restriction does not operate by its terms upon *persons* who sue in this court as assignees, that is to say, it does not purport to exclude the particular case from the cognizance of this court because the *person* who prosecutes the suit derives his interest in or connection with the controversy through an assignment. It is only when the assignee seeks to recover the "contents of a chose in action" that, by the terms of the act, this restriction is applicable. It is not in respect to the character of the plaintiff as assignee, but to the nature of the subject matter of the suit, that the restriction is applicable. By its terms,

the restriction only includes suits "to recover the contents of choses in action."

Admitting, then, for the sake of the argument, that the contracts in question are choses in action, there cannot be the slightest ground for assuming that this is a suit to recover their "*contents*," nor can it even be fairly said to be founded upon these contracts, for it is founded upon the subsequent unlawful acts of the defendants, or some of them, by which a new, independent and adverse title to these lands is asserted to have originated. Such a suit cannot justly be said to come within either the spirit and reason or the letter of the restriction.

6. While it must be admitted that this is a court of *limited* jurisdiction, it is certainly not a court of *inferior* jurisdiction, in the common law sense of the term. It is a court of general jurisdiction in all cases coming within its cognizance, in the sense that all its proceedings are entitled to the same presumptions and intendments which obtain in respect to other courts of general jurisdiction (*Turner* v. *Bank of North America*, 7 Dallas, 11). We insist that the rule which presumes in favor of the jurisdiction of courts, unless the contrary appears, ought to have this application to Circuit Courts of the United States, if no other. That, where it appears affirmatively on the face of the record (as it certainly does in the present case), that a suit comes within the discription of controversies which, by the terms of the Constitution of the United States, are cognizable by the Federal Courts, and also comes within the discription of the act of Congress conferring jurisdiction, and its exclusion depends solely upon the operation of a clause which forms an exception to, restriction of, or a limitation upon, the general words by which jurisdiction is conferred, the presumption should be in favor of the jurisdiction, *and the court should take cognizance*, unless the case comes clearly and distinctly within the true meaning of the exception or limitation or restriction. Nay, the court should feel bound to take cognizance, because the right to sue in the Federal Court is a constitutional right where Congress has provided the tribunal, which cannot be denied except from the highest and gravest considerations. The Circuit Courts of the United States should, therefore, for all

purposes, be taken as courts of general jurisdiction in cases where the citizenship of the parties and ihe amount in controversy come within the language of the Constitution and the acts of Congress, and, therefore, when these primary jurisdictional facts appear, the presumption should be in favor of the jurisdiction. In other words, the *proviso* in question constitutes simply a restriction of the previous general words, by the operation of which, plenary, general, original jurisdiction is conferred in respect to all controversies between citizens of different States, where the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; the effect of which restriction can only be to exclude cases coming within its exprese terms. If this position be sound, the rule to be deduced from it is, that the restriction in the Judiciary Act, and the proviso in the Revised Statutes should alike be strictly construed.

7th. Although we are not aware of anycase in which stress is laid upon a strict construction of the restriction, yet the uniform current of decisions in this court, in applying it, attests and confirms the rule, as we have stated it, that is to say, when the case comes within the description of the previous general words, it cannot be excluded from Federal cognizance, unless it comes clearly within the express words of the exception. To some of these cases we will refer briefly.

It has been uniformly held that, when promissory notes, and other negotiable instruments are payable to the payee named or "bearer," suits in favor of the holder and not the original payee, do not come within the restriction, though it is apparent that the title of the holder is derived through an assignment. Two grounds have been stated for the distinction. *First*, the transfer being by delivery, merely, the title passes by operation of law, and not by assignment, within the strict letter of the act; and, *second*, such instruments are to be taken, to contain a contract and promise to each successive holder, and upon this the holder is supposed to sue. We submit, these distinctions are almost too nice to be entirely obvious, but they show that because the cases did not come clearly and distinctly within the express words of the restriction, they could not be excluded. The "denial of the jurisdiction of suits of assignees has never been taken in an absolutely literal sense," and "that the restriction applies only to contracts which may

be properly said to have contents," "not mere naked rights of action founded on some wrongful act, some neglect of duty, to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed," per CHASE, *C.J.*, *Bushnell* v. *Kennedy* (9, Wallace, 387), citing *Barney* v. *The Globe Bank* (2 Am. L. R., N. S., 229 (1862) ; *Bullard* v. *Bell*, 1 Mason, 259.

So in *Young* v. *Bryant* (6 Wheaton, 146) it was held that: "A suit might be brought in the Circuit Court by the endersee against the endorser, whether a suit could be there brought against the drawer or not."

It is obvious that such a suit would be by an *assignee* to recover the contents of a *chose of action*, and also that no suit could have been brought in the Circuit Court if the same had not been assigned, yet here the jurisdiction is sustained, for the reason that the chose in action sued upon is not strictly that which has been assigned, that is to say, there is supposed to have been a new contract entered into between the endorser and endorsee, upon which the suit is brought. While the case then, comes within the letter of the statute, applying the rule of strict construction, it does not come within its spirit and purpose, and therefore the restriction is held not to apply.

In *Mollan* v. *Torrance* (7 Wheaton, 538), it is stated that: "An endorsee of a promissory note, who resides in a different State, may sue in the Circuit Court of the United States his immediate endorser, residing in the State where the suit is brought, although that endorser be a resident of the same State with the maker of the note." In *McDonald* v. *Smalley* (1 Peters, 620): "It has not been alleged, and certainly cannot be alleged, that a citizen of one State, having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie." Smith *v.* Kernochan (7 Howard, 198): "Ejectment may be maintained by an assignee of a mortgage, although the mortgagee is a citizen of the same State with defendant." See also *Wood* v. *Dummer* (3 Mason, 308) *Dexter* v. *Smith*, (2 Mason 303); *Bean* v. *Smith* (2 Mason, 252).

8. At the hearing below great stress was laid by counsel for the defendants upon the case of *Sheldon* v. *Sill* (8 Howard, 441)

where it was held that a suit in equity to foreclose a mortgage could not be maintained in the Circuit Court of the United States by an assignee whose assignor could not sue in that court, but the reasons upon which Mr. Justice Grier based the opinion of the court clearly distinguish it form the case at bar. It is said :

"In equity, the bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. The remedy based on it, in a Court of Equity, is not a recovery of the land, but the satisfaction of the debt. The complainant seeks to recover by this action, a debt assigned to him."

In other words, it is upon the ground that the moneys due upon the bond secured by the mortgage (being the "contents" of a chose in action) cannot be sued for and recovered in the Circuit Court by an assignee, by means of a bill in equity to foreclose the mortgage by which the payment of those moneys is secured.

Whereas, in the case at bar, admitting the contracts set up in the bill, to be choses in action, and admitting the the moneys due and to become due thereunder to be the " contents of a chose in action," and admitting, even more, that the estate and interest, bargained for by the purchaser of these lands, may be treated as the " contents, of a chose in action," it is entirely obvious that this suit is not commenced for the recovery of these " contents," but, as before stated, to avoid by the operation of the decree of the Circuit Court the effect of the subsequent wrongful transactions of the defendants, whereby a later, independent adverse estate is attempted to be created. In other words, the Circuit Court was called upon by the complainants' bill, not to render judgment for the recovery of the " contents of a chose in action " assigned to the complainant, but to declare that the defendants have no lawful right to set up *a new, subsequent, independent and adverse estate in the lands derived through wrongful acts to which the complainants, his assignors and the contracts, under which they claim, are severally strangers.*

9. The Circuit Court in announcing its views on this question, incidently stated that the present suit was " founded upon contracts," in favor of an assignee, and, as such, would be excluded from Federal cognizance under the operation of the Act of March, 1875, and that, since the Act of 1875, was intended

to extend rather than to confine the jurisdiction of the Federal Courts, it could scarcely be contended that any case could be *included* under the Act of 1789 and *excluded* under the Act of 1875. Whatever may be the force of this reasoning when the question properly arises, we take the ground that the case at bar would not be excluded by the operation of the Act of 1875, even if it had been brought since that act went into operation, for the reason that the suit is not only *not* a suit to recover the "contents of a chose in action," but it is not a suit "founded upon contract," within the meaning of the act. We take it for granted that for the purposes of the operation of the restriction contained in the Act of 1875, "suits founded on contracts" are those which are brought to enforce some right or remedy growing primarily, not incidentally, out of the contracts under which the plaintiff claims. If these words are to be interpreted according to their ordinary significance, that would be their meaning as we understand them. Now, the contracts are the foundation or the bases of the complainants' interest in the lands in question, but they are not the foundation or bases of the *suit*. As repeatedly observed, the *suit* is founded upon an adverse claim of title to the same lands by strangers to this complainant and his contracts, based upon other contracts to which the complainant is a stranger, subsequently made by his adversaries with these public officers after the rights of the complainant's assignors had fully vested, which subsequent contracts are claimed by the complainant to be wrongful, unlawful and invalid, as against his title; and this suit primarily calls upon the court to determine the question, whether the subsequent acts complained of are or are not wrongful and unlawful, and to declare that the title of the defendants, based upon those wrongful and unlawful acts, is of no effect, as against the equitable interest of the complainant in the lands. The complainant's contracts are merely incidental to this controversy, showing to the court that he is entitled to complain of these subsequent proceedings under which the adverse estate is claimed to have originated. They are not, in any sense, the foundation of the suit, though they may be the foundation of the complainant's title.

We contend, therefore, finally, with the greatest confidence, that, whether the restriction contained in the Act of 1789, as modified in the Revised Statutes of 1874, is to be strictly con-

strued in its operation so as to include only those cases which come within its express words, or whether it is to be applied to all cases coming generally within the scope of its spirit and purpose, the present case is not included within any signification that can be properly given to its words, and is, therefore, not excluded from Federal cognizance.

## II.

Attention is also called to the form of the court's decree, dismissing the complainant's bill in general terms. We submit that, at the most, conceding the views of the Circuit Court to have been correct in respect to the question of jurisdiction, it could, with propriety, only have dismissed the bill without prejudice.

See Barney *v.* Baltimore, 6 Wall, 280.

Respectfully submitted,

J. D. CAMPBELL,
*Of Counsel.*

Davenport, Iowa.

JAN 28 1882
JAMES H. MCKENNEY, CLK.

# Supreme Court of the United States.

## NO. 271.

AUSTIN CORBIN, APPELLANT.

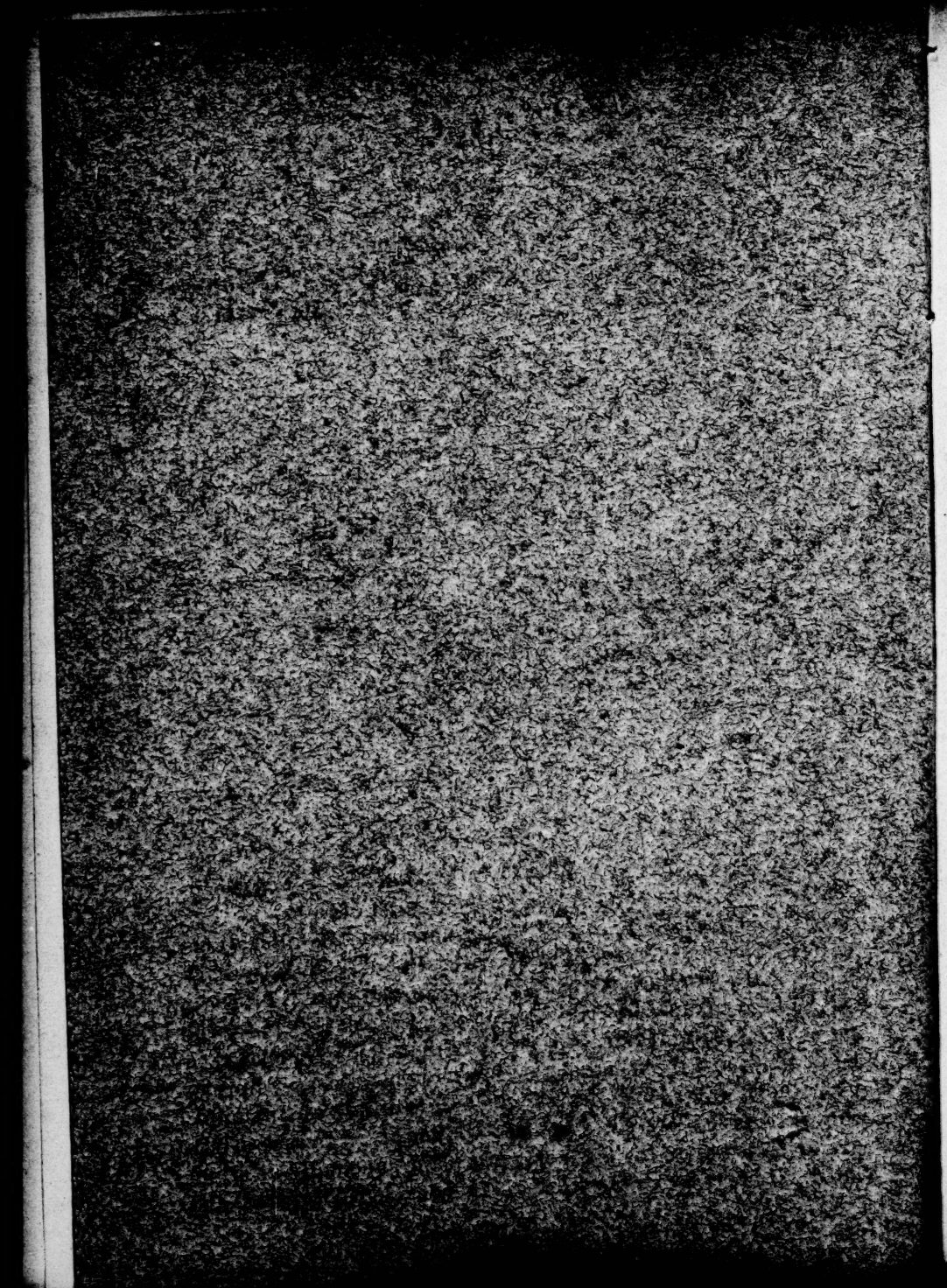
vs.

THE COUNTY OF BLACK HAWK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

## BRIEF FOR APPELLEES.

PARSONS & RUNNELLS,
*Des Moines, Iowa.*



# Supreme Court of the United States.

NO. 271.

OCTOBER TERM, 1881.

AUSTIN CORBIN, *Appellant*,

vs.

THE COUNTY OF BLACK HAWK, ET AL, *Appellees*.

## BRIEF FOR APPELLEES.

This is an appeal, by the plaintiff, from a judgment of the circuit court of the United States, for the district of Iowa.

So far as material to any question now here the allegations of complainant's bill are "that upon the 10th day of July, 1857, one Wm. H. McClure entered into a contract with John Kerr, school fund commissioner for the county of Black Hawk, for the purchase of certain lands, one-fourth of the purchase money then being paid, and the remainder secured by the purchaser's promissory note, payable ten years from date, with interest annually; conveyances to be executed upon full payment. "In case of failure to make any of the payments aforesaid punctually as stipulated, all previous payments shall be considered forfeited, and

and the land subject to be sold by the school fund commissioner, or the payment of the money enforced according to law, at the option of said commissioner."

*Record*, p. 8.

Further payments are alleged to have been made, but it is not alleged that the lands were at any time fully paid for. It is further alleged that upon the first day of July, 1871, McClure executed and delivered to the complainant an assignment as follows:

"Know all men by these presents that I, Wm. H. McClure, in consideration of the sum of one hundred dollars in hand paid to me by Austin Corbin, of Kings county, State of New York, the receipt whereof is hereby acknowledged, do hereby sell and convey to the said Austin Corbin *all the interest in the following described land*, viz: Lots numbers three (3), eleven (11), and twelve (12), being the north half of the southeast quarter of the northeast quarter and the east half of the southeast quarter of section sixteen (16), township eighty-nine (89) north, of range number fourteen (14) west of the fifth principle meridian, in Black Hawk county, Iowa, *which was conveyed to me by a contract*, now on file in the office of the county auditor of Black Hawk county, Iowa, made by and between John Kerr, school fund commissioner of said county, and Wm. H. McClure, for the conveyance of said lands, *and I hereby sell and assign to said Corbin all my rights under said contract*, covenanting with him that I have not sold, assigned, or transferred the same to any person or persons.

In witness whereof I have hereunto set my hand this first day of July, 1871.

WM. H. McCLURE.

In presence of—

DAN'L W. FOOTE.

Endorsed on back as follows:

This assignment filed in my office this 1st day of July, A. D. 1871.

D. W. FOOTE, *Auditor*."

*Rec.*, p. 9.

That upon the 12th day of January, 1872, the complainant offered to pay to the *county auditor* of said county the purchase

money remaining unpaid. That all the other defendants are either county officers, or are purchasers from the county with notice of McClure's rights

The decree asked, is that defendants be required to convey. This bill was filed in the circuit court July 23d, 1878. When the suit was actually commenced is not shown by the record. Other similar contracts are referred to.

The county filed its separate demurrer as follows:

"The county of Black Hawk, by protestation, not confessing or acknowledging all or any of the matters or things in the said further amended and substituted bill filed by complainant herein on July 23d, 1878, to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer says:

I. It does not appear upon said bill of complainant that this court *has jurisdiction of the said alleged causes of action or of the parties hereto*, or that the complainant's *several assignors* could have maintained actions in this court against these defendants upon the said several contracts.

II. *The said bill contains no allegations* sufficient to entitle the complainant to the equitable relief therein demanded.

III. It appears upon the face of said bill that this action did not accrue *within ten years prior to* the commencement thereof."

*Rec.*, p. 9.

The auditor and county treasurer demurred as follows:

"D. W. Foote, auditor of said county of Black Hawk, and R. A Whitaker, treasurer of the same, by protestation, not confessing or acknowledging all or any of the matters or things in the further amended and substituted bill of complainant filed herein July 23d, 1878, to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer say:

I. It does not appear upon said bill of complaint that this court has jurisdiction of the said alleged cause of action or of the parties hereto, or that the complainant's several assignors could have maintained actions in this conrt against these defendants upon the said several contracts.

II. The said bill contains no allegations sufficient to entitle complainant to the equitable relief therein demanded.

III. It appears upon the face of said bill that this action did not accrue within ten years prior to the commencement thereof.

IV. It appears upon the face of said bill that said alleged causes of action accrued more than three years prior to the commencement of this action.

V. The title to said lands was at the time of said contracts in the state of Iowa, as the real party in interest, and not in said county, and no action can be maintained against said county or these respondents for a failure by said officers to perform the duties imposed upon them as the agents of the state."

*Rec.*, p. 10.

All of the other defendants demurred as follows:

"All the respondents named in the further amended and substituted bill of the complainant filed herein July 23d, 1878, except the county of Black Hawk, and the auditor and treasurer thereof, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill to be true in such manner and form as the same are alleged and set forth therein, demur thereto, and for cause of demurrer say:

I. It does not appear from the said bill of complaint that this court has jurisdiction of the said alleged causes of action or of the parties hereto, or that the complainant's several assignors could have maintained actions in this court against these defendants upon said several contracts.

II. The said bill contains no allegations sufficient to entitle the complainant to the equitable relief therein demanded.

III. It appears upon the face of said bill that this action did not accrue within ten years prior to the commencement thereof.

The court directed that the question of jurisdiction be first argued, and declined to hear argument upon any of the other questions raised by the several demurrers. The demurrers were sustained and a decree rendered dismissing the bill."

*Rec.*, p. 11.

I.

The record contains no prayer for reversal, or assignment of errors.

*Rev. S.*, sec. 997.

## II.

The bill not only fails to show that the court had jurisdiction but it appears affirmatively that it had not.

If there could, by any possibility, have been a doubt under the judiciary act, which we suppose there could not have been, there certainly can be none under the present law.

For convenience of reference we print—

Judiciary act:

"PROVIDED, That no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of ofreign bills of exchange."

Act of March 3, 1875:

"Nor shall any circuit or district conrt have cognizance of any suit *founded on contract* in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

If this suit is not founded on *contract*, what is it founded on? If the plaintiff did not get such rights as he has by *assignment*, how did he get them? If he did not bring this suit *to enforce* these contracts what did he bring it for?

The argument in the court below was, that there is a distinction between mere promises to pay, and contracts for a breach of which, damages only, may be recovered, "contents," and those relating to real estate in which the relief sought is *the thing itself*, specific performance.

We answered:

*First.* That if a contract may have *contents* the thing that *is* in it comes more clearly within the meaning of the term than something that is *not* in it, but which in the event of an action, must be recovered, if at all, in lieu of what was agreed upon and by way of compensation—transubstantiation. That of the two, if there was any distinction, to bring ordinary contracts where damages only—*money*, when that was not the thing specified—were sought to be recovered,—not for a detention of or an injury to the the thing, but because the promisor had not kept his promise,—was

more doubtful, and required a more liberal construction than the other.

*Second.* That so far as the argument was based upon the idea that the agreement was to convey land, the case was not distinguishable in principle from any other contract of which a court of equity would enforce the specific performance. That so long as the claimant had nothing but a right of action founded upon contract, a right to *demand* the title because the other party had so contracted, in short, whenever he could recover only by proving an executory contract made by the defendant with some other person, and its assignment by the latter to him, the case was within the statute, and an assignee could not *give* jurisdiction by electing to pursue any particular form of action or by electing to sue in equity rather than at law; that so long as he was the holder of a mere equity or a right to acquire the thing, or a right to recover damages for a breach of contract, he stood in no better situation than his assignor, and must sue, where he must have sued. We maintained that this was so under the judiciary act, but if that admitted of doubt, in view of what this court has said of the word "contents" as there used and its proper meaning as limiting the extent of the proviso, there could be no doubt under the law as it now stands. We further contended that it was possible that it was the very purpose of congress in substituting the words "of any *suit* founded on contract" for the words "of any suit *to recover* the *contents* of any chose in action" either to change the law, or to remove any doubt that might be, or might have been, suggested as to its true construction. The former seems to have made the *purpose* of the suit the test of jurisdiction, the present its subject matter, the *foundation* of the suit, "any suit founded on contract," whatever may be the relief sought. We thought at the time of the argument, and now submit to your honors, that if there was any doubt before, this change means something, that the extent of the exception is not matter of construction for which there is neither room nor occasion, that if this very case had been in the minds of congress, language more appropriate to it could not have been used. Upon the argument in the circuit court, we referred to such authorities as *Sheldon vs Sill* 8 *How.* 449 and *Deshler vs Dodge* 16 *id* 630, but I did not think then, nor do I now that they or any other cases which we

were able to find, were either controlling, or that they cast very much light upon the matter in debate. If a suit for specific performance—for the enforcement of a contract *according to its terms*—were the same thing in effect as an action of ejectment, there would be much force in the argument of counsel, that, as it is conceded that the one is not within the exception, the statute ought not to receive a *construction* which would exclude the other, in other words that the substance being the same, the statute ought not to receive a construction which would make the question of jurisdiction depend merely upon a matter of form. Yet it is very doubtful whether a statute expressed in plain and unambiguous language ought to be *modified* by the courts even to that extent. We have been furnished with no brief in this court and the engagements of the writer are such as to make it nearly imperative that what is to be done in the case by way of printed brief or argument should be done at once.

The authorities cited in the court below, were such and such only, as we in no way question. They were to the effect that when a sale has taken place and title passed, the vendee may maintain his action in the circuit court of the United States, or that a claim for damages, a chose in action, not resting on contract, but arising by operation of law, when it could be assigned at all so as to give the assignee a right of action in his own name, was not within the proviso in the judiciary act, or the exception in the statute as it now stands. Clearly not, because neither by its terms extends to such a case. The former this court has made to depend somewhat upon the word *contents* and the purpose of the action, and perhaps somewhat upon the context any "promissory note" and the state of the law at that time—very generally—as to the non-assignability of mere rights in action. So far as I have been able to ascertain this court has not been called upon to give any construction to the statute as it now stands, in the particulars here presented or which will by way of argument cast any light upon these questions. They have not seemed to us, to need any. In the court below counsel said many things, in a general way, about the jurisdiction of the federal courts, their history, about local jealousies and apprehensions, and about the importance of there being an impartial tribunal somewhere free from local influence or prejudice where every one

would stand a fair chance, that there should be no New England or South Carolina and many other things as easily said and equally pleasing to hear, but so far as I was able to appreciate the argument it is all indicated in what is above conceded, and which so far as I know nobody questions.

As the court below passed only upon the question of jurisdiction we suppose this court will consider no other. Our clients in view of the large amount involved in the aggregate, at least for a suit of this character in the state of Iowa, and that all of them except the county officers live, and have for many years lived upon the lands purchased and claimed by them—all highly cultivated and well improved farms in one of the best counties in the state—and consequently its still greater importance to them individually, have expressed a desire that we argue the case orally before your honors, and in obedience to their wishes, while believing, as we have said to them, that it is subjecting your honors to so much uncalled for punishment, we shall feel it our duty to do so.

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